



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Milwaukee Enrollment Services, Petitioner

v.

[REDACTED] Respondent

AMENDED DECISION
(Corrected Appeal Rights)
FOF/169930

PRELIMINARY RECITALS

Pursuant to a petition filed November 06, 2015, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on December 14, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

NOTE: Judicial Notice was taken of the plea agreement and judgment of conviction in case Federal Criminal [REDACTED]

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED] IMSA
Milwaukee Enrollment Services
1220 W Vliet St, Room 106
Milwaukee, WI 53205

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. On May 11, 2011, the Respondent completed an ACCESS application for FoodShare benefits. That application contained a penalty warning that advised the Petitioner that he could be disqualified from the program for selling or trading his benefits. The Petitioner electronically signed the application indicating, "I understand the penalties for giving false information or breaking the rules". (Exhibit 12)
2. On May 12, 2011, Milwaukee Enrollment Services (the agency) sent the Respondent an eligibility and benefits booklet that also advised him of the penalties for trading or selling his benefits. (Exhibit 13; See also: <https://www.dhs.wisconsin.gov/publications/p0/p00079.pdf>)
3. Respondent (CARES # [REDACTED]) received FoodShare benefits on the 11th of the month, from October 2010 through October 2011. He received \$200 per month, except in May 2011, when he received a prorated amount of \$116. (Exhibit 7)
4. An EBT card issued to the Respondent was used at [REDACTED] to make three, \$100.00 "purchases" on June 11, 2011, July 11, 2011 and August 11, 2011. (Exhibits 14 and 15)
5. During the time in question, [REDACTED] was no longer selling food, but was instead purchasing FoodShare benefits at a fraction of face value. (Exhibit 16)
6. On November 12, 2015, the agency prepared an Administrative Disqualification Hearing Notice, alleging that the Respondent trafficked \$300.00 in benefits from [REDACTED] from June 11, 2011 to August 11, 2011. (Exhibit 3)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on December 14, 2015. The Respondent was advised of the date, time and location of the hearing, in an Administrative Disqualification Hearing Notice. [REDACTED] indicated that the at the time of the hearing and when the notice was mailed, the Respondent had an open FoodShare case and that the notice was sent to the Respondent's last known mailing address. (See Exhibit 3) [REDACTED] also indicated that the agency did not receive any returned mail.

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain his failure to appear. As such, it is found that the Respondent did not have good cause for his non-appearance.

What is an IPV?

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is the Burden of Proof?

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude

has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

The Merits of OIG’s Claim

In the case at hand, Milwaukee Enrollment Services has established, by clear and convincing evidence, that the Respondent was selling his FoodShare benefits. First, the Respondent’s EBT card was used to redeem \$300 worth of FoodShare benefits with [REDACTED]. Second, the transactions were for even dollar amounts. Third, the transactions occurred on the 11th of the month, the day the Respondent regularly received his benefits. Fourth, the Respondent went through at least four different EBT cards in a 12 month period between March 2011 and March 2012. (See Exhibit 15) It is extremely difficult to believe that anyone who is legitimately using an EBT card would have need to replace his or her EBT card four times in 12 months. Finally, during the time in question, [REDACTED] was no longer a subcontractor distributing meat and seafood; but was instead purchasing EBT benefits for a fraction of face value. As such, the Respondent had to have been selling his benefits.

Based upon the foregoing, it is found that the Respondent trafficked \$300 in FoodShare benefits from June 2011 through August 2011.

There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). There is nothing in the record to rebut the presumption that the Respondent intentionally sold her benefits to [REDACTED]. On the contrary, the Respondent was warned in his May 2011 application and in the Eligibility and Benefits booklet about the consequences of selling his benefits, but he did it anyway.

CONCLUSIONS OF LAW

The Respondent committed an intentional program violation (IPV) by trafficking her benefits with [REDACTED] in January 2012 and February 2012.

This is the first such violation.

THEREFORE, it is

ORDERED

That the IPV for claim number [REDACTED] is sustained and that the Respondent is hereby ineligible to participate in the FoodShare program for a period of one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

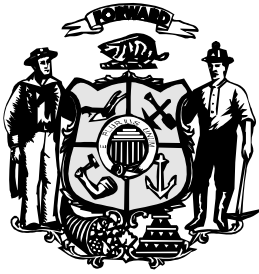
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse

Given under my hand at the City of Milwaukee,
Wisconsin, this 11th day of January, 2016.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 11, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@dhs.wisconsin.gov